

# Coercive Covert Action and the Law

*Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad in International and American Law.* By W. Michael Reisman & James E. Baker. New Haven: Yale University Press, 1992. Pp. 250 (Cloth). Price: \$28.50.

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Academic reputations and dust-jacket comments can be misleading,<sup>1</sup> but when I first picked up *Regulating Covert Action* and read the high praise on the back of the jacket from both the very liberal Princeton Professor Richard A. Falk and the comparably conservative former U.N. Ambassador Jeane Kirkpatrick — both of whom I hold in high regard — I anticipated a delightful and rewarding read. I was not disappointed.

W. Michael Reisman is the Wesley N. Hohfeld Professor of Jurisprudence at Yale Law School and ranks among the world's foremost scholars of international law. A close colleague of the legendary Professor Myres S. McDougal, who is regarded by many as the world's preeminent scholar in the field of international law, Reisman's writings typify the "New Haven School" of jurisprudence, which focuses less on the textual analysis of legal instruments than on ascertaining the expectations of governing elites on the permissibility of policy options.<sup>2</sup> In this volume, Professor Reisman is joined as a co-author by his former student, James E. Baker, who adds the perspective gleaned from working for several years as a legislative assistant to Senate Intelligence Committee Chairman Daniel Patrick Moynihan following his service as a Marine Corps officer. Since co-authoring the book, Baker has worked as an attorney in the Office of the Legal Adviser to the Department of State, with the President's Foreign Intelligence Advisory Board, and on the legal staff of the National Security Council.

*Regulating Covert Action* is, by any standard, an *excellent* book, and it

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1. See Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 903 (1994).

2. On the assumption that many readers of the *Journal* will be quite familiar with Professor Reisman's jurisprudential approach, I have refrained from a more detailed summary. Readers seeking a brief introduction are urged to read chapter two of the volume being reviewed. See W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* 17-25 (1992). A more extensive exposition of what has been termed the "New Haven School" of jurisprudence can be found in MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961).

deserves a far wider readership than its narrow title might attract. The book provides both a valuable summary of a number of controversial operations<sup>3</sup> and an excellent overview of how the legal regime governing the low-intensity use of armed force has developed under the U.N. Charter.<sup>4</sup> Indeed, one of the few arguable shortcomings of *Regulating Covert Action* may be its title. Most of the volume is equally applicable to *overt* coercive efforts to influence foreign governments, yet inapplicable to many activities properly encompassed by the broad term "covert action."<sup>5</sup> Furthermore, some of the most important "regulations" governing U.S. covert operations do not appear in this volume because they are classified.<sup>6</sup>

## I. DEFINING "COVERT ACTION"

Unfortunately, the nature of most "covert" operations is largely misunderstood. The typical "covert action" does not involve the threat or use of military force against foreign States,<sup>7</sup> and many do not involve "coercion" of any sort. The widespread misunderstanding is not all that surprising, however, as most "special activities" remain unknown to the public. Those that are "leaked" and judged by the media to be worthy of significant press coverage tend to be only the most controversial. While only a tiny fraction of CIA operations over the years have involved efforts to assassinate foreign leaders<sup>8</sup> or to finance paramilitary armies to replace objectionable foreign

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3. REISMAN & BAKER, *supra* note 2, at 48-67.

4. *Id.* at 38-48, 78-115.

5. Exec. Order No. 12,333 (December 4, 1981) uses the term "special activities" rather than "covert action," and provides this definition:

*Special activities* means activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.

Exec. Order No. 12,333, pt. 3.4(h), 3 C.F.R., 1982 Comp. *reprinted in* 50 U.S.C. § 401 (1988).

Congress defines "covert action" as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad where it is intended that the role of the United States Government will not be apparent or acknowledged publicly . . . ." Several enumerated exclusions qualify this definition. Intelligence Authorization Act, Fiscal Year 1991, sec. 602, § 503(e), 105 Stat. 429, 443 (codified at 50 U.S.C. § 413b(e) (Supp. V 1993)) (amending National Security Act of 1947, § 501).

The Department of Defense considers "covert operations" to be those "[o]perations which are so planned and executed as to conceal the identity of or permit plausible denial by the sponsor. They differ from clandestine operations in that emphasis is placed on concealment of identity of sponsor rather than on concealment of the operation." U.S. DEP'T OF DEFENSE, JT. PUB. NO. 1-02, *DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 95-96 (1989).

6. Unless the process has changed significantly since I left the White House a little more than a decade ago, each agency within the Intelligence Community is required to draft detailed internal regulations and procedures that are submitted, *inter alia*, to the Office of Intelligence Policy and Review at the Department of Justice for approval by the Attorney General prior to being implemented. Such regulations are taken seriously within the Community and play an important role in "regulating" covert action and other intelligence functions; however, because they are classified, the Reisman-Baker book could not assess them.

7. The authors note that "paramilitary operations account for a relatively small part of the total number of covert operations." REISMAN & BAKER, *supra* note 2, at 128.

8. A major difficulty in discussing this issue is the definition of "assassination." *Id.* at 70, 127. Most definitions of the term include either the word "murder" or the legal elements thereof, and by that

governments,<sup>9</sup> these kinds of "covert operations" receive the greatest publicity. Much of the public, therefore, associates the term with activities widely viewed as nefarious<sup>10</sup> and contrary to democratic values.

Many also harbor a perception that such operations are conducted covertly because the government knows they would be rightly condemned if made public and a corresponding belief that secrecy *per se* is somehow incompatible with American democratic traditions.<sup>11</sup> Nevertheless, secrecy is often

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definition I share the authors' view that "assassination should be viewed as an unlawful covert action and should not be given any color of law." *Id.* at 70. When the Church Committee examined this issue, its basic conclusion was that the CIA had over the years been involved in a very small number of "assassination" operations, several of which were directed at Cuban dictator Fidel Castro and were unsuccessful, and a few other operations that ultimately resulted in the deaths of foreign officials (e.g., Ngo Dinh Diem in South Vietnam and Salvador Allende in Chile). In both the Diem and Allende incidents, however, there was no clear evidence that the Agency either encouraged or expected the officials to be killed. Today, part 2.11 of Exec. Order 12,333 (Dec. 4, 1981) expressly provides that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." Exec. Order 12,333, *supra* note 5, at pt. 2.11. A distinction should be made, in my view, between politically-motivated "murder" and the intentional targeting of a political leader engaged in an aggressive war. In the latter case, the victim State has a legal right to use necessary and proportional lethal force in self-defense. See Robert F. Turner, *Killing Saddam: Would It Be A Crime?*, WASH. POST, Oct. 7, 1990, at D1 (commentary and opinion).

9. While U.S. support for paramilitary covert operations is widely believed to be unique to the Cold War era, see, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* at ix (1993), in reality, the first such operation dates back at least to 1804, when Thomas Jefferson was President and James Madison his Secretary of State. This operation was apparently the brainchild of James Leander Cathcart, U.S. ex-Consul to Tripoli, who in a June 29, 1801, letter to William Eaton, U.S. Consul to Tunis, argued that the only way of preventing the Bey of Tripoli (Joseph Bashaw) from preying upon U.S. merchant shipping in the Mediterranean would be "by effecting a revolution in favor of Hamet the Bashaw's Brother." Letter from James Leander Cathcart to William Eaton (June 29, 1801), in 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS, 1785-1801, at 494 (1939). Eaton subsequently raised the idea with Madison, and the United States secretly raised a small army of Greek and Arab mercenaries who launched an attack against Tripoli in 1804. Tripoli had already declared war against the United States over our failure to pay annual tribute for the protection of our commerce. The operation, which was a complete success, is discussed in ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS* 217-21 (1976).

10. While most Americans would (hopefully) agree that their government ought not, as a general principle, destabilize regimes with which it disagrees, most reported CIA interventions are considerably more complex than they appear at first glance. Typically, the CIA became involved only in response to perceived foreign (typically Soviet or Cuban) intervention, and often not until perceived Leninist "clients" had taken repressive measures against democratic opposition groups. The objective, in many instances, was simply to "level the playing field" by offsetting the perceived external Leninist influence. To be sure, many motives may exist for a covert operation of this nature. Thus, Reisman and Baker note that the 1953 covert operation to undermine Mohammed Mossadegh's regime in Iran occurred after Mossadegh had dissolved parliament, "rigged" an election, and refused to surrender power when dismissed by the Shah. Further, Moscow had been working actively for years trying to gain control over oil-rich Iran, and Mossadegh was believed to be under the strong influence of the *Tudeh* (Communist) Party. It is also true, however, that Mossadegh posed a threat to U.S. commercial oil interests. REISMAN & BAKER, *supra* note 2, at 49-50. Similarly, the United States did not decide to intervene against the Marxist-Leninist Sandinistas in Nicaragua until it became clear that they were actively seeking to overthrow several neighboring governments. See *infra* at notes 47-71; see also ROBERT F. TURNER, *NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS* 7-21 (1987).

11. Professor John Hart Ely, former Dean of Stanford Law School, argues that, even during times of congressionally authorized "war," it is unconstitutional for the President to keep significant campaigns secret "unless there is a compelling military justification . . ." ELY, *supra* note 9, at 199 n.60. In fact, secrecy was recognized as an important element of effective foreign policy even before the drafting of the U.S. Constitution (an act which itself, one might note, was carried out under strict rules of secrecy — with Madison later commenting that no Constitution would have been possible under an open process). For a brief discussion of the importance of secrecy in the eyes of the Founding Fathers and its large role in early

required to protect sensitive foreign sources of intelligence information,<sup>12</sup> to conceal particularly effective methods of intelligence gathering,<sup>13</sup> or even to promote a peaceful resolution of a potentially explosive great-power confrontation by allowing an adversary to make policy concessions without "losing face" before the entire world.<sup>14</sup> Indeed, Reisman and Baker make a persuasive case that a covert operation might have been preferable to the 1989 U.S. military intervention in Panama ("Operation Just Cause") that led to the arrest of General Manuel Noriega:

The costs, in terms of lives, *matériel* and social and economic disruption, to the United States, to particular target states and to non-targeted third states might be substantially less if the modality of implementation selected were in whole or in part covert. Consider, for a moment, the costs of expelling General Noriega from Panama in October, 1989, by means of an internally-initiated but externally and covertly supported coup, as opposed to the destructive economic war of attrition with the same objectives that reduced much of Panama to economic rubble before the full-scale military invasion in December finished the job.<sup>15</sup>

If the public were aware of the intelligence community's undisclosed efforts to prevent the proliferation of weapons of mass destruction or to reduce the influence of international drug cartels, organized crime, or terrorist

American constitutional practice, see Turner, *War and the Forgotten Executive Power Clause*, *supra* note 1, at 921-29.

12. In *Federalist* No. 64, John Jay observed:

There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. . . . [A]nd there doubtless are many . . . who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

THE FEDERALIST No. 64, at 434-35 (John Jay) (Jacob E. Cooke ed., 1961).

13. For example, overhead platforms (satellites) that are far more capable than a powerful adversary realizes may provide the United States with information justifying a covert operation. If the United States concealed its involvement, the adversary would be less likely to deduce that certain activities thought secret were in fact being monitored by the United States and would be less likely to take precautions that would deny the United States potentially vital information thereafter.

14. This was clearly a motive for the United States' covert response to Soviet and Cuban military adventurism in Angola in 1975. In the wake of the U.S. decision (mandated by congressional military aid cuts) to abandon the noncommunist peoples of Indochina to Pol Pot and Hanoi's Stalinist regime — a government which continues to rank among the world's dozen worst human rights violators — Moscow perceived the change of governments in Portugal and the resulting decision to surrender colonial control of Angola as a "target of opportunity." Had the United States overtly challenged Soviet actions in Angola, Moscow might well have felt that its credibility with various revolutionary regimes and movements would suffer too greatly if it "gave in" to American pressures. By moving covertly — and Angola is a good example of an operation that was known to a key target (the USSR) but (until disclosed by members of Congress) "covert" to most of the rest of the world — the United States was able to put pressure on Soviet policymakers without greatly increasing the costs to Moscow of a policy shift.

15. REISMAN & BAKER, *supra* note 2, at 8. To be sure, one might quarrel with the authors' choice of hypothetical, as there was hardly widespread agreement about the "legality" of Operation Just Cause (which one of my Pentagon lawyer friends describes as "Operation Just Because"). Indeed, I have personally been critical of the Panama intervention in terms of its compliance with international law. Such developments as the Security Council's approval of armed intervention in Haiti, however, may ultimately establish a new legal regime permitting armed external intervention (ideally multilateral) for the purpose of restoring democracy. See *infra* notes 78-81 and accompanying text. For efforts to defend the Panama intervention, see, e.g., Anthony D'Amato, *The Invasion of Panama Was A Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990); Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281 (1991).

groups, a quite different attitude toward covert operations might well exist. For example, when American hostages were seized in Tehran in early November of 1979, Canada reportedly carried out a "covert operation" designed to help several American diplomats who had evaded capture and taken refuge in the Canadian Embassy to escape Iran and return to the United States. Canada understandably wished to conceal its role in the rescue operation, not because it was ashamed or thought the action contrary to law or moral values, but because it realized that its own nationals in Tehran would be placed at risk if radical forces aligned with the Ayatollah Khomeini learned of its complicity in the rescue operation.

One almost gets the impression that the authors of *Regulating Covert Action* briefly forgot the broad scope of the doctrine addressed by their title when they wrote in the introduction: "We were anxious to undertake this assignment not because we like the idea of covert action — we do not . . . ."<sup>16</sup> Opposing all "covert action" is akin to being against all "secrecy," even when it is used to thwart criminal activity or to support fundamental humanitarian values. Yet, even if one were to apply the narrow definition used in the book's subtitle, "covert coercion abroad," Reisman and Baker clearly do not, in fact, oppose all of its manifestations.<sup>17</sup> They nevertheless do understand that acting covertly carries a price, and they provide a very valuable service by identifying the inherent "down sides" of bypassing normal democratic decisionmaking processes.<sup>18</sup>

During the time I was charged with overseeing and passing judgment on the legality of U. S. covert operations, my strong sense was that most U.S. "special activities" would have readily received the overwhelming support of the American people had they been disclosed. Even at the height of the relatively more active reign of Director of Central Intelligence William Casey — a time when I was regularly briefed on all U.S. "special activities" — the large majority of these operations were, in my judgment, noncontroversial and clearly designed to further values that both international law and the American people cherish.

## II. THE INTERNATIONAL RULES OF THE GAME

Reisman and Baker provide a useful discussion of the coercive use of military, economic, diplomatic, and ideological tools. They conclude, for example, that covert bribery of foreign officials by a State is probably legal,<sup>19</sup> but that counterfeiting another State's currency and circulating bogus bills on the international market would likely be unlawful.<sup>20</sup>

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16. REISMAN & BAKER, *supra* note 2, at 1.

17. See, e.g., *id.* at 6, 77, 140.

18. See, e.g., *id.* at 14-15, 137.

19. *Id.* at 29.

20. *Id.* at 30. While on detail to the U.S. Embassy in Saigon during the Vietnam conflict, I recall being on the periphery of a psychological warfare campaign in which the United States printed a replicated North Vietnamese "5 Dong" note on one part of a leaflet beside a note in Vietnamese suggesting that continued intervention in South Vietnam would harm Hanoi's economy (or perhaps devalue its currency — my recollection is imprecise). Presumably, the propaganda text could have been cut from the leaflet, leaving essentially a counterfeit bank note in the hands of its finder. At any rate, the leaflet was never

A. *The "Peace vs. Justice" Debate and the U.N. Charter*

The book also includes an excellent historical summary of the struggle to reconcile the original U.N. Charter's emphasis on peace and stability with the preference of the Leninist camp and many Third World States for rules permitting external armed intervention to aid "wars of national liberation" or "anti-colonial" and "anti-apartheid" struggles.<sup>21</sup> The authors term this later phenomenon "an interesting but potentially mischievous doctrine of neo-just war and intervention."<sup>22</sup> They note that the doctrine has found support in a variety of United Nations General Assembly Resolutions and treaties from Protocol I to the 1949 Geneva Conventions<sup>23</sup> to the 1979 Convention Against the Taking of Hostages.<sup>24</sup> The authors conclude that "[i]t is unclear whether this standard will become international law or will remain stillborn, like much of the General Assembly's legislative program in the 1970s, having been rejected by indispensable actors in the international prescriptive process."<sup>25</sup>

That question cannot yet be answered with any confidence, and the related trends are somewhat contradictory. On one hand, the Soviets renounced the so-called "Brezhnev Doctrine" used to justify intervention in Hungary, Czechoslovakia, and (arguably) Afghanistan,<sup>26</sup> and the primary targets of "anti-colonial" and "anti-apartheid" struggles have ceased to exist. Ignoring for a moment the fact that one might quarrel with the authors' characterization of the so-called "Reagan Doctrine" as having a "parallel structure" to the Brezhnev Doctrine,<sup>27</sup> that policy, too, appears to have been abandoned. Thus, most of the claimed "exceptions" to the prohibition against the use of nondefensive armed force may no longer be very relevant and reestablishing a general consensus around the original San Francisco formula may well be possible. On the other hand, as will be discussed,<sup>28</sup> the July 1994 decision by the U.N. Security Council authorizing military intervention in Haiti to restore a democratically elected government that had been deposed by an internal, unelected authoritarian regime may signal the birth of a new exception to the Charter's general prohibitions against nondefensive uses of military coercion and non-intervention in the "internal affairs" of sovereign

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used, reportedly because a lawyer in the review process had concluded that it might violate international law. In contrast, Iran has reportedly circulated nearly perfect counterfeit U.S. one hundred dollar bills for several years as part of a campaign both to raise funds for terrorist activities and to undermine the U.S. economy. See, e.g., Bill McAllister, *Overseas Counterfeiters Pose Threat to U.S. Currency*, WASH. POST, Apr. 8, 1994, at A19 (quoting terrorism expert Robert Kupperman as saying that groups of terrorists backed by Iranian and Syrian intelligence agencies were "believed to have produced \$1 billion worth of the most nearly perfect \$100 bills that the Secret Service has ever detected"); Nick Rufford & James Adams, *Iran Linked to Flood of Fake Dollars*, SUNDAY TIMES (London), July 17, 1994, at 18.

21. REISMAN & BAKER, *supra* note 2, at 21, 26-27, 38-43, 89.

22. *Id.* at 27.

23. *Id.* at 43.

24. *Id.*

25. *Id.* at 89.

26. For a general discussion of this issue, see JOHN NORTON MOORE & ROBERT F. TURNER, *INTERNATIONAL LAW AND THE BREZHNEV DOCTRINE* (1987).

27. REISMAN & BAKER, *supra* note 2, at 44, 86. For a different perspective on the "Reagan Doctrine," see Robert F. Turner, *International Law, the Reagan Doctrine, and World Peace: Going Back to the Future*, WASH. Q., Autumn 1988, at 119.

28. See *infra* notes 71-81 and accompanying text.

States.<sup>29</sup>

## B. Self-Defense and Countermeasures

Contrary to this more expansive role for nondefensive interventions, the authors note that "a line of decisions, culminating in *Nicaragua*, has sought to narrow the operation of this right [of self-defense] even further by creating a new and higher legal threshold, by redefining the technical term *armed attack* and using it as the prerequisite for unilateral resort to self-defense."<sup>30</sup> One can only hope this trend will be reversed, as it is contrary both to the clear *travaux préparatoires* of the Charter and to the cause of international peace.

Indeed, this is an area where the authors may warrant criticism. While, pursuant to the New Haven approach, they dismiss strict textualism as a jurisprudential tool, the authors nevertheless assert: "If one adopts a strict textual interpretation of international law, one need look no further than the United Nations Charter for the answer to these questions. Article 2(4) proscribes the use of force except in self-defense and 'armed attack' is the threshold for self-defense."<sup>31</sup> A thorough discussion of this issue is beyond the scope of this review, but a few observations are in order. When the Charter was written, States had a right to use necessary and proportional armed force in defense against any act of unprivileged external armed intervention.<sup>32</sup> As Professor (and later World Court Judge) Philip C. Jessup argued, "the right of self-defense by its very nature must escape legal regulation."<sup>33</sup> That, clearly, was the position of the U. S. government<sup>34</sup> and of highly distinguished legal scholars.<sup>35</sup>

The issue, then, is whether the Charter limited or otherwise modified the customary law of self-defense. Article 2(4) of the Charter provides the basic textual prohibition against the use of force in international law:

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29. See *infra* notes 80-81 and accompanying text.

30. REISMAN & BAKER, *supra* note 2, at 89.

31. *Id.* at 73.

32. Until the 1928 Kellogg-Briand Treaty, even aggressive acts of force were not clearly prohibited. That treaty, moreover, did not limit the use of force in self-defense, a position emphasized by the United States and several other delegations and widely recognized by legal scholars. On June 28, 1928, for example, the United States sent diplomatic notes to the principal foreign offices of the world affirming that:

[The United States] believes that the right of self-defense is inherent in every sovereign State and implicit in every treaty. No specific reference to that inalienable attribute of sovereignty is therefore necessary or desirable. It is no less evident than resort to war in violation of the proposed treaty by one of the parties thereto would release the other parties from their obligations under the treaty towards the belligerent State.

1 U.S. FOREIGN REL. 91 (1928). See also J.L. BRIERLY, *THE LAW OF NATIONS* 407 (6th ed. 1963); 1 CHARLES FENWICK, *INTERNATIONAL LAW* 278 (4th ed. 1965).

33. PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 163 (1952).

34. During the Kellogg-Briand Treaty negotiations, the United States argued, for example, that "[e]very nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense." 1 U.S. FOREIGN REL. 36 (1928).

35. See, e.g., Quincy Wright, *Intervention*, 51 AM. J. INT'L L. 257, 269 (1957).

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Article 1 of the Charter sets forth the "Purposes" of the United Nations, none of which suggests a desire to prevent nations from defending themselves — or other victim States — from armed international aggression. Nor does the reference to "territorial integrity or political independence" reasonably preclude the defensive use of necessary and proportional force in response to a prior wrongful use of armed force by another State.

Those who read the right of self-defense narrowly tend, therefore, to rely upon the expression "armed attack" found in Article 51 of the Charter, which provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." Thus — apparently in accord with the views of Reisman and Baker — Professor Louis Henkin, of Columbia Law School, argues:

The fair reading of Article 51 permits unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed attack occurs. Nothing in the history of the drafting (the *travaux préparatoires*) suggests that the framers of the Charter intended something broader than the language implies.<sup>36</sup>

Many knowledgeable scholars disagree with this view that Article 51 narrowed the right of self-defense. To the extent the meaning of the Charter text is ambiguous, recourse may be had to the *travaux préparatoires*, as provided by Article 32 of the Vienna Convention on the Law of Treaties.<sup>37</sup> Professor J. L. Brierly, in *The Law of Nations*, summarizes the preparatory works from the San Francisco Conference, discusses differences in the Charter's text among the five languages in which it was originally drafted,<sup>38</sup> and determines "that the opening words 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence' show a clear intention not to impair the 'inherent', i.e., the existing, natural right of states to use force in self-defence . . . ."<sup>39</sup>

Professor Brierly notes, for example, that the Russian text refers to the "imprescriptible" right of self-defense,<sup>40</sup> a concept embraced by the United States at the time of the Kellogg-Briand Treaty,<sup>41</sup> and that the French text is translated not as "armed attack" but as "armed aggression" — arguably a broader term. He also notes the unconditional nature of the French text, which suggests that the use of "if" in the English translation was intended to express a hypothesis, not a condition.<sup>42</sup> Other highly respected international legal

36. LOUIS HENKIN, *HOW NATIONS BEHAVE* 141 (2d ed. 1979).

37. U.N. Doc. A/CONF. 39/27 (1969), reprinted in 8 INT'L LEGAL MATERIALS 679 (1969).

38. U.N. CHARTER, art. 111.

39. BRIERLY, *supra* note 32, at 417.

40. *Id.* at 418.

41. See *supra* note 32 and accompanying text.

42. BRIERLY, *supra* note 32, at 419.



scholars have taken a similar position,<sup>43</sup> as did the U.S. Government both before and after the Charter was written.<sup>44</sup>

### III. NICARAGUAN COVERT ACTION AND THE PARAMILITARY ACTIVITIES CASE

Indeed, the recent publication of ICJ Judge Stephen Schwebel's *Justice in International Law*,<sup>45</sup> which includes lectures and articles dating well over a decade before the *Paramilitary Activities* (or *Nicaragua*) case came before the Court, refutes any suggestion that his brilliant dissent was influenced by allegiance to his native United States. Rather, his position was consistent with his previous understanding of the Charter's prohibition of low-intensity aggression and the right to use force in collective self-defense in response to such acts.<sup>46</sup> It is worth noting that Nicaragua's memorials in the case argued a theory of international law that was quite similar to the position embraced by the United States. According to the parties, the crux of the matter was largely the *factual* issue of which side struck first. Nicaragua and the United States accused each other of essentially identical behavior, such as, covertly providing funds, weapons, ammunition, other equipment, training, intelligence, communications, and strategic guidance to guerrillas operating in El Salvador and Nicaragua.<sup>47</sup> Nicaragua, however, swore to the Court that it had given no assistance to the Salvadoran guerrillas of the Farabundo Marti National Liberation Front ("FMLN").<sup>48</sup> In contrast, the United States did not deny its support for the Nicaraguan *Contras*, arguing instead that it was acting in collective self-defense of El Salvador, which had requested U.S. assistance and was under a serious and sustained attack by the Sandinista-backed FMLN.<sup>49</sup>

In reality, as Judge Schwebel's dissent demonstrated, the evidence that Nicaragua intervened in El Salvador (and other countries) to overthrow the lawful government of that country was overwhelming.<sup>50</sup> Indeed, throughout its early history, the Sandinista Front was avowedly Marxist-Leninist and

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43. See, e.g., D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 152 (1958); ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 200-01, 204 (1963).

44. For examples of early United States, United Nations, and Organization of American States support for the position that armed force could be used in response to indirect aggression, see Robert F. Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 VAND. J. TRANSNAT'L L. 53, 56-69 (1987) [hereinafter Turner, *Peace and the World Court*].

45. STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW (1994).

46. See, e.g., *id.* at 530-92.

47. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 61 (June 27); see also *infra* note 53 and accompanying text.

48. See, e.g., Sworn Affidavit of Miguel D'Escoto Brockmann, Foreign Minister of Nicaragua, dated April 21, 1984, submitted to the International Court of Justice: "In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador."

49. On the question of whether El Salvador actually requested U.S. assistance, see *infra* note 63.

50. My own writings at the time of the case illustrated the same point. See, e.g., TURNER, *supra* note 10. Judge Schwebel's dissent cited this study, which resulted from work as a consultant to the office of the Department of State Legal Adviser, in manuscript form.

openly embraced an "internationalist duty" of assisting neighboring "national liberation" movements.<sup>51</sup>

The classified evidence was even stronger. Even the House Permanent Select Committee on Intelligence — a group chaired by Representative Edward Boland (author of the various "Boland Amendments") that was consistently critical of U.S. support for the *Contras* — admitted that the classified evidence it had seen established "with certainty" that

A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas.

The Salvadoran insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material, and propaganda activities.

The Sandinista leadership sanctions and directly facilitates all of the above functions.<sup>52</sup>

During this same time period, reporters from the *New York Times*,<sup>53</sup> *Washington Post*,<sup>54</sup> and *Los Angeles Times*<sup>55</sup> quoted various Salvadoran guerrilla leaders as acknowledging that the Sandinistas were supplying them with arms and other assistance; indeed, Nicaraguan President Daniel Ortega has indirectly admitted providing such aid.<sup>56</sup> The ICJ, nevertheless, in a highly political decision, elected to ignore the evidence.

Particularly harmful was the Court's holding that acts of armed aggression falling below an "armed attack" threshold could be countered only by the individual efforts of the victim State, without a right to the "collective" assistance of neighbors or treaty partners.<sup>57</sup> The Court reasoned:

The acts of which Nicaragua is accused . . . could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.<sup>58</sup>

The likely impact of this holding was astounding, given that peaceful Costa Rica, with a population like Nicaragua's of roughly three million, had no army at all and only a small "civil guard" of about 8,000 lightly-armed men. In contrast, by the end of 1985, Nicaragua had built up a modern army

51. See, e.g., *id.* at 43-45.

52. U.S. CONGRESS, HOUSE, PERMANENT SELECT COMMITTEE ON INTELLIGENCE, AMENDMENT TO THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1983, H.R. REP. NO. 122, 98th Cong., 1st Sess. 6 (1983). For other statements of a similar nature by this committee and other groups who had access to classified intelligence information, see TURNER, *supra* note 10, at 82-86.

53. See, e.g., Alan Riding, *Salvador Rebels: Five Sided Alliance Searching for New, Moderate Image*, N.Y. TIMES, Mar. 18, 1982, at A1.

54. See, e.g., Christopher Dickey, *Leftist Guerrillas in El Salvador Defend Cuba Ties*, WASH. POST, Mar. 11, 1983, at A1.

55. See, e.g., David Wood, *Salvadoran Ties to Cuba Cited: Rebels Brag of Cuban Ties*, L.A. TIMES, Mar. 13, 1983, at A1.

56. See TURNER, *supra* note 10, at 91.

57. *Nicar. v. U.S.*, Merits, 1986 I.C.J. at 110.

58. *Id.* at 127.

numbering about 64,000, had announced plans to more than triple that strength,<sup>59</sup> and was equipped with an array of Soviet artillery, armor, and air power (including the most modern Hind-D helicopters) that was unprecedented and unmatched in the region.<sup>60</sup>

Until the Court's ruling, Costa Rica had every reason to assume the wisdom of its decision to invest in public education, social welfare programs, and similar democratic priorities, rather than an army — which its constitution in fact prohibited — was sound. After all, if a military threat to its security were to arise, it could rely upon the United States and other OAS allies to come to its assistance. By taking the view that victims of externally supported, low-intensity armed aggression could rely upon only their own resources for defense, even though such intervention might ultimately bring about a change of government and deny the people their right to self-determination just as thoroughly as a massive direct invasion, the Court both encouraged armed international aggression and discouraged States like Costa Rica from forsaking a large military establishment in favor of meeting the human needs of its citizens. Ultimately, perhaps the greatest need of States and their citizens is national security; thus, when it undermined the right of collective self-defense, the Court greatly increased the likelihood of regional arms races.

*Regulating Covert Action* handles *Paramilitary Activities* well, though the discussion of the case is brief. The authors not only reject the Court's extremely narrow interpretation of the right of self-defense,<sup>61</sup> but further question the legality of the Court's decision to ignore both U.S. and Salvadoran claims that El Salvador had requested U.S. assistance in collective self-defense prior to the filing of the case.<sup>62</sup> The Court's action on this issue was all the more outrageous because only the United States and El Salvador would have had knowledge of the existence (or lack) of such a request.<sup>63</sup>

The *Paramilitary Activities* Case was clearly an anomaly. Opinions of the ICJ have no precedential authority as *stare decisis*,<sup>64</sup> and it is now embarrassingly clear that the Court was simply deceived — perhaps too easily in some cases — by the covert nature of Nicaragua's efforts to overthrow

59. See, e.g., Turner, *Peace and the World Court*, *supra* note 44, at 70-71 nn.59-61 and sources cited therein.

60. See TURNER, *supra* note 10, at 15-16.

61. REISMAN & BAKER, *supra* note 2, at 98.

62. For the record, I discussed this issue personally with Salvadoran President Alvaro Magaña Borja while visiting El Salvador as a Deputy Assistant Secretary of State in early 1984 and was assured that such a request had, in fact, been made. I had accompanied a delegation of presidential election observers to El Salvador in connection with the 1984 presidential elections and (along with Professor John Norton Moore, a member of the U.S. presidential delegation) spoke with President Magaña on this issue at that time.

63. Reisman and Baker write:

The presumption that the United States was not engaged in collective self-defense at the request of El Salvador, which the court rendered *juris et de jure* by not permitting El Salvador even to argue for its right to intervene, was outcome-determinative and of dubious lawfulness. Indeed, in subsequent phases of the case, judges who had voted against El Salvador on this point expressed their regret.

REISMAN & BAKER, *supra* note 2, at 98.

64. "The decision of the Court has no binding force except between the parties and in respect to that particular case." I.C.J. STAT., art. 59.

neighboring governments. While a decade ago the covert nature of Nicaraguan involvement in El Salvador may have been less evident, an explosion in Managua two years ago led to a series of discoveries that revealed Sandinista support of guerrillas in neighboring States. The *Washington Post* reported that:

explosions that ripped through a car repair shop on the outskirts of Managua at dawn May 23 [1993] sent shock waves far beyond Nicaragua. From the debris have emerged a guerrilla arsenal threatening the Salvadoran peace process, documents detailing a Marxist kidnapping ring directed against Latin American millionaires, and hundreds of false passports and identity papers.

The three blasts . . . killed two people, damaged 16 houses and exposed a sophisticated bunker beneath the shop containing tons of weapons, including 19 surface-to-air missiles. . . .

Few familiar with the case believe such an operation could have been set up without at least the Sandinista Front acting as a willing host. Following the triumph of their revolution in 1979, the Sandinistas developed, with the help of Soviet Bloc and Cuban advisers, the most sophisticated intelligence operation in Central America. The Sandinista Front also hosted groups from the PLO, Italian Red Brigades, ETA and Libya.<sup>65</sup>

In the weeks following the explosion, FMLN leader Shafik Jorge Handal (who also served as Secretary General of the Communist Party of El Salvador) admitted to an outraged U.N. Secretary General Boutros Boutros-Ghali that the weapons found in the debris — and tons of other weapons hidden in nearly a dozen other secret locations near Managua — belonged to his organization. An account in the *Washington Post* of the Secretary General's angry letter, in which he denounced what he termed the FMLN's "deliberate attempt to mislead me," concluded by observing: "For most of the 1980s, the FMLN received substantial arms support from Nicaragua's Marxist-oriented Sandinista government, and the weapons caches are believed to date from that period. That cooperation reportedly lessened after the Sandinistas lost power in Nicaragua's 1990 elections."<sup>66</sup>

Alluding to the reams of documents found by the Chamorro government following the May explosion, the *Los Angeles Times* reported:

[T]he stash revealed a vast kidnapping and weapons-smuggling network run by Latin revolutionaries for much of the last decade. . . .

The discovery revived memories of the Sandinistas' recent past, when, as rulers of Nicaragua from 1979 to 1990, they converted the country into a haven for radical leftists from around the world. . . .

Throughout the 1980s, the Sandinistas . . . welcomed and gave refuge to terrorists,

65. Douglas Farah, *Managua Blasts Rip Lid Off Secrets*, WASH. POST, July 14, 1993, at A1. Any serious doubts about the Sandinista's connection with the arms depot should have been abated when it was learned that "serial numbers were removed from 16 of the 19 surface-to-air missiles immediately after the blasts to make it impossible to trace their origins. Sources said the missiles, which were picked up by the [Sandinista-controlled] army, were black with soot and ash except for shiny spots where the serial number should have been." *Id.* Shortly thereafter, President Violeta Chamorro called for the resignation of Sandinista General Humberto Ortega as chief of the armed forces. Humberto Ortega, brother of former Nicaraguan President Daniel Ortega, served as Defense Minister during the 1980s, when the Sandinistas were in power. See *Ortega to Step Down*, THE TAMPA TRIBUNE, Dec. 22, 1994, at 6.

66. John M. Goshko, *Salvadorans Accused of Hiding Arms; Guerrilla Cache Said to Be in Nicaragua*, WASH. POST, June 17, 1993, at A37. See also *Arsenal Mars New Image of Salvador's Ex-Rebels*, N.Y. TIMES, June 26, 1983, at A8.

Communists and assorted radicals from Latin America, the Mideast and Europe.<sup>67</sup>

In September, another "huge cache of arms" belonging to "Guatemalan guerrillas" was found in Nicaragua,<sup>68</sup> lending support to the *New York Times* observation that "the Sandinistas provided extensive support for leftist rebel groups," during their reign in Nicaragua in the 1980s.<sup>69</sup>

In essence, the *Paramilitary Activities* case was a dispute over facts. The United States claimed that Nicaragua was providing a broad range of assistance, including large quantities of arms and ammunition, to the FMLN for the purpose of overthrowing the Government of El Salvador. American mirror-image covert assistance to guerrillas in Nicaragua was designed to discourage Managua's unlawful interference in neighboring States and was thus justifiable collective self-defense in response to El Salvador's request. Nicaragua, on the other hand, denied giving such aid to the FMLN. Whatever confusion might have existed a decade ago on this issue, the facts are now clear. The Sandinistas deceived most of the judges on the World Court and a lot of other people as well. *Paramilitary Activities* was an unfortunate aberration of little value — except, perhaps, as evidence of Nicaragua's successful use of covert action to deceive the international community.<sup>70</sup>

#### IV. A NEW DEMOCRACY NORM IN INTERNATIONAL LAW?

The development of international law is an evolutionary process, and one of the most interesting questions being raised in the post-Cold War era concerns the preferred status of democracy as a form of government. For the United States, the principle is an ancient one: Thomas Jefferson, as our first Secretary of State, argued that the new Nation ought to "acknowledge any government to be rightful which is formed by the will of the nation substantially declared."<sup>71</sup> Writing to John Adams less than five years before their coincidental deaths on July 4, 1826, Jefferson envisioned a bright future for their mutual experiment in government and thus asserted that "the flames

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67. Tracy Wilkinson, *Stalking the Rich for Ransom: An Illegal Arms Depot Blast in Nicaragua Reveals a Far-Reaching Network of Terror — A Ring of Leftist Rebels Who Kidnapped Latin America's Wealthy*, L.A. TIMES, July 28, 1993, at A1.

68. Tim Golden, *New Arms Scandal Adds to Nicaragua's Woes*, N.Y. TIMES, Sept. 5, 1993, at A20.

69. *Id.*

70. Since these words were written, the latest version of Professor Shabtai Rosenne's classic work, *The World Court: What It Is and How It Works*, has been published. It includes a postscript discussing the May 23, 1993 car repair shop explosion and the events that followed, concluding that they "cannot be reconciled with statements made in Court on behalf of Nicaragua." Professor Rosenne, widely regarded as the world's foremost authority on the Court, concludes:

To a very large extent these revelations [sic] brought to light a situation closely resembling that which had been described by the State Department [prior to the Court's decision] . . . , and confirmed facts elucidated by Judge Schwebel in his questioning from the Bench.

This is not the first time that an international tribunal has been misled by one of the parties in its appreciation of the facts. It remains to be seen how far these later revelations, following on an accidental explosion in Managua, will affect the different assessments that have been made of this case and its value as a precedent, especially where the unwilling respondent withdrew from further participation in the proceedings before the merits were reached.

SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 152-53 (5th ed. 1995).

71. Letter from Thomas Jefferson to Gouverneur Morris (Nov. 7, 1792), in 6 *THE WRITINGS OF THOMAS JEFFERSON, 1792-1794*, at 131 (Paul Leicester Ford ed., 1895).

kindled on the 4th. of July, 1776. have spread over too much of the globe to be extinguished by the feeble engines of despotism. On the contrary they will consume those engines, and all who work them."<sup>72</sup>

Sadly, that dream did not quickly become a reality. Throughout most of our history, authoritarian and totalitarian regimes have greatly outnumbered those espousing democracy as a preferred theory of government. The early 1980s, however, witnessed a dramatic growth of democracy in Latin America.<sup>73</sup> The subsequent collapse of the Soviet empire produced a virtual explosion of States embracing the idea that the "will of the people" is the only legitimate basis of government.<sup>74</sup> By 1992, Professor Thomas M. Franck, Editor in Chief of the *American Journal of International Law*, speculated that "democracy . . . is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes."<sup>75</sup>

Professor Reisman has been at the forefront of the struggle for such a right to democracy,<sup>76</sup> and *Regulating Covert Action* adds intellectual strength to the cause. The authors write:

Genuine self-determination is . . . in our view, the basic postulate of political legitimacy of this century. . . .

Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure. In some instances, it may be the only possibility. Other interventions have the manifest objective and consequence of doing exactly the opposite. There is, thus, neither need nor justification for treating in a mechanically equal fashion, United States covert operations in postwar Greece or Italy, which sought to enable the exercise of self-determination, on the one hand, and Soviet covert intervention in Poland or Cuban operations in Central America, which undermine popular movements and impose undesired regimes on coerced populations, on the other. . . . It is like equating a mugger's knifing of a citizen on the street with a surgeon's removal of a tumor from that ailing citizen, because both actions involve one human being's putting a knife into another. The strikingly different appraisals of these various cases by the international legal system should occasion no surprise.<sup>77</sup>

Since *Regulating Covert Action* was written, several developments have occurred that suggest the lawfulness of external intervention to restore a democratically elected regime when it has been replaced by tyranny, at least in some circumstances. In Latin America the acceptance of such intervention seems particularly strong, a fact that may seem surprising, given Latin

72. Letter from Thomas Jefferson to John Adams (Sept. 12, 1821), in 2 THE ADAMS-JEFFERSON LETTERS, 1812-1826, at 575 (Lester J. Cappon ed., 1959).

73. In 1979, perhaps a third of the people of Latin America lived under governments that were arguably democratic. By 1986, that figure exceeded 90 percent. See TURNER, *supra* note 10, at 1.

74. See, e.g., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, reprinted in 29 I.L.M. 1306 (1990), through which 35 States in 1990 (including the Soviet Union, East Germany, Bulgaria, Romania, and many other formerly totalitarian regimes) embraced the doctrine that "democracy is an inherent element of the rule of law" and committed themselves to a range of specific safeguards designed to make that rule a reality. *Id.* at 1308.

75. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

76. See, e.g., W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984).

77. REISMAN & BAKER, *supra* note 2, at 74-75.

America's long history of regional resentment of unilateral U.S. intervention under various corollaries to the Monroe Doctrine. Yet, the principle that "representative democracy" is the only legitimate form of government finds expression in the 1948 Charter of the Organization of American States (OAS).<sup>78</sup>

This historic commitment to representative democracy has been reaffirmed many times by the OAS. For example, on June 5, 1991, OAS members unanimously approved General Assembly Resolution 1080, which instructed the OAS Secretary General:

to call for the immediate convocation of a meeting of the Permanent Council in the case of any event giving rise to the sudden or irregular interruption of the democratic political institutional process of the legitimate exercise of power by the democratically elected government in any of the Organization's member States, in order, within the framework of the Charter, to examine the situation, decide on and convene an ad hoc meeting of the ministers of foreign affairs, or a special session of the General Assembly, all of which must take place within a ten-day period.<sup>79</sup>

Writing in a Council on Foreign Relations study last year, former OAS Principal Legal Adviser Domingo Acevedo argued that OAS members no longer consider the illegal overthrow of a democratically elected government to be "a matter essentially within the domestic jurisdiction of its member States, and thus immune from international scrutiny." He added that the OAS's handling of "the coup in Suriname in December 1990, the attempted coup in Venezuela in February 1992, and the so-called autogolpe by the constitutional president of Peru in April 1992 and of Guatemala in May 1993," demonstrates this change in perspective.<sup>80</sup>

U.N. Security Council Resolution 940 may arguably contain additional support for the view that military intervention is permissible to eject a military government and restore a democratically elected regime to power. Although the Security Council justified intervention in Haiti on the grounds that "the situation in Haiti continues to constitute a threat to peace and security in the region," it is difficult to identify any "threat to peace and security" posed by the Cédras regime at least as those terms have traditionally been understood. Certainly Haiti had not used military force, or threatened to use such force, against any other State. The underlying motive behind the Security Council's action appears to have been the desire to restore "democracy" in Haiti. If that objective is legal, then a more favorable legal assessment of the 1989 U.S. intervention in Panama (Operation Just Cause) may ultimately be warranted.<sup>81</sup>

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78. CHARTER OF THE ORGANIZATION OF THE AMERICAN STATES, art. 5(d).

79. ORGANIZATION OF AMERICAN STATES, GENERAL ASSEMBLY RESOLUTION 1080 (June 5, 1991), reprinted in NATIONAL SECURITY LAW DOCUMENTS, at 561 (Moore et al. eds., 1995).

80. Domingo E. Acevedo, *The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 119, 141 (Lori Fisler Damrosch ed., 1994). See also FRANCISCO VILLAGRAN DE LEON, THE OAS AND DEMOCRATIC DEVELOPMENT (U.S. Institute of Peace, 1992).

81. Though I am a great proponent of democracy, I am not a fan of deception in such matters. Presumably, the veto power protects the United States from Security Council abuse. I am nevertheless troubled by the "threat to peace and security" rationale relied upon to justify intervention in Haiti, an action that under the language of the Charter would otherwise appear to be barred by the prohibition

## V. DEMOCRACY, DEMOCIDE, AND PEACE

The publication last year of Professor Rudy Rummel's new book, *Death By Government*, which examines the problem of "Democide" — the killing of people by their own governments — has enormous importance in making the case for a democracy norm. Rummel's research, backed by hundreds of pages of tabulated data, suggests that fifteen regimes alone have killed nearly four times more people than have died in all of the wars of this century.<sup>82</sup> Lest the reader conclude that Professor Rummel simply exaggerated the human costs of specific totalitarian regimes, it is noteworthy that a 1994 report by the *Washington Post* provided an aggregate figure for the "unnatural deaths" under Mao, Stalin, and Hitler ranging from 112 to 162 million,<sup>83</sup> a figure substantially higher than Rummel's estimate of 101 million for the same regimes.<sup>84</sup>

Even if Professor Rummel's estimates are significantly off, the importance of his research in validating the promotion of democratic governance would not be greatly diminished. When one adds the research being done by scholars such as Professor Bruce Russett of Yale University and Professor John Norton Moore of the University of Virginia on the importance of democracy in avoiding international wars, the case for a democracy norm in international law becomes all the more powerful. Using covert action as a means of promoting democracy may seem incongruous at first glance, and permitting individual States to use such an option entails some obvious risks. At the same time, however, the option lends sufficient advantages over the overt military option that it ought not be entirely or automatically ruled out.<sup>85</sup>

## VI. CONSTITUTIONAL SEPARATION OF POWERS

U.S. covert action is regulated as much by domestic rules as by international law, and some of the most interesting and important related legal issues involve the separation of national security powers under the Constitution. Perhaps understandably, if lamentably, the authors essentially "ducked" this critically important question by arguing that "[a] Hamilton may be matched against a Madison,"<sup>86</sup> and concluding that the constitutional

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against intervention "in matters which are essentially within the domestic jurisdiction of any state . . . ." U.N. CHARTER art. 2, ¶ 7. If the Security Council has concluded that customary international law now permits international intervention in support of democratic governance, it should say so openly.

82. R. J. RUMMEL, *DEATH BY GOVERNMENT* 3 (1994). A supplementary volume, *Statistics of Democide*, should be available from the University of Virginia Center for National Security Law by the time this Review is published.

83. Valerie Strauss and Daniel Southerland, *How Many Died?*, WASH. POST, July 17, 1994, at A22.

84. RUMMEL, *supra* note 82, at 8.

85. See, e.g., REISMAN AND BAKER, *supra* note 2, at 8. See also note 15 and accompanying text.

86. *Id.* at 117 (quoting Justice Jackson's concurring opinion in *Youngstown*). Writing as *Helvidius*, Madison did challenge Hamilton's *Pacificus* argument that the executive power clause gave the President general control over foreign relations. As early as 1789, Madison himself had argued, as a member of Congress, that this clause vested in the President all powers "executive" in their nature — subject only to the narrowly construed exceptions expressly provided in the Constitution. See 1 ANNALS OF CONG. 515-17 (Joseph Gales ed., 1789). At the time the Constitution was written, every country treated foreign



arguments "are inconclusive" and "are better engaged elsewhere."<sup>87</sup> Yet they are unable to resist the temptation to add the conclusion that "what is clear, and indeed common ground, is that any executive power to conduct covert action insofar as it exists, absent statutory authority, arises from an implied constitutional power and not an explicit enumerated power."<sup>88</sup>

I strongly disagree with the authors on this point. While a detailed discussion of the President's constitutional authority over such matters is beyond the scope of this review, the reader should be aware that a serious case can be made that the "executive power" vested in the President by Article II of the Constitution includes a general grant of authority to control the nation's external intercourse, subject only to constitutional limitations, such as those "exceptions" clearly enumerated elsewhere in the Constitution, including the power of the Senate to veto a completed treaty<sup>89</sup> and the power of either the House of Representatives or the Senate to veto the decision to launch an aggressive "war."<sup>90</sup>

Reisman and Baker do acknowledge that, "[a]s a matter of practice, at least since President Jefferson, the executive has conducted covert action without specific congressional authorization."<sup>91</sup> They might usefully have included evidence from the considerable body of constitutional history, however, which ranges from John Jay's comment in *Federalist* No. 64 that the Constitution left the President "able to manage the business of intelligence in such manner as prudence may suggest,"<sup>92</sup> to the early practice of appropriating funds for foreign affairs in gross — leaving their use to executive discretion and allowing the President to account merely for the *amount* of money spent for purposes considered too sensitive to disclose to Congress.<sup>93</sup> President Jefferson summarized this early practice in an 1804 letter to Treasury Secretary Albert Gallatin: "The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . ."<sup>94</sup> More specifically, President Jefferson also remarked that: "[I]t has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the

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affairs as an "executive" function — as did such influential publicists and writers as Vattel, Locke, Montesquieu, and Blackstone. For excerpts from Madison's 1789 statement and other relevant early documents on the issue, see Robert F. Turner, *The Constitutional Framework for the Division of National Security Powers between Congress, the President, and the Courts*, in JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 749, 758-59 (1990).

87. *Id.* at 118.

88. *Id.*

89. U.S. CONST. art. II, § 2.

90. *Id.* art. I, § 8. For discussions of the scope of the "declare war" clause and the meaning of the "executive power" clause, see Turner, *War and the Forgotten Executive Power Clause*, *supra* note 1, at 906-10, 929-49.

91. REISMAN AND BAKER, *supra* note 2, at 118.

92. FEDERALIST NO. 64, *supra* note 12, at 435.

93. "[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually . . . ." 1 Stat. 129.

94. Letter from Thomas Jefferson to Albert Gallatin (Feb. 19, 1804), *reprinted in* 11 THE WRITINGS OF THOMAS JEFFERSON, at 5 (Andrew A. Lipscomb ed., 1905).

footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President."<sup>95</sup>

Jefferson funded paramilitary covert operations against the Barbary Pirates from this "secret service" account, and when such operations were later disclosed, Congress raised no question about the propriety of such behavior or about any need for prior congressional authorization.<sup>96</sup> Congress did not assert a constitutional right to monitor such sensitive operations until the post Vietnam/Watergate era, and although, in the interest of comity, the Executive branch has acquiesced in some of the subsequent restrictions (primarily having to do with reporting requirements), the constitutional basis for legislative micromanagement of such activities is highly suspect.

Reisman and Baker note that much of the recent constitutional debate has been characterized by "[s]olemn invocations of Supreme Court decisions such as *Curtiss-Wright* or *Youngstown*," a debate they find "inconclusive."<sup>97</sup> To be sure, it has become popular<sup>98</sup> for advocates of greater legislative control over foreign affairs to argue that the 1936 *Curtiss-Wright*<sup>99</sup> approach — by far the most often cited Supreme Court authority for foreign affairs cases — has been narrowed or even overturned by Justice Jackson's concurring opinion in the *Youngstown* case.<sup>100</sup> While the two cases may at first appear to conflict, they are actually quite easy to reconcile. At the heart of both Justice Black's majority opinion and the famous Jackson concurrence in *Youngstown* is the theme that seizing control of the Nation's steel mills, even during time of "emergency," was a "domestic" action requiring "due process of law." This was a quite reasonable interpretation of the Fifth Amendment's mandate that takings of private property require "due process of law."<sup>101</sup>

Time and again, Justice Jackson stressed that he was addressing the President's "internal" and "domestic" actions and that he would have given the President the widest latitude if his actions had been "external" to the country. In contrast, the *Curtiss-Wright* case has for more than fifty years been the landmark Supreme Court decision on the President's *foreign affairs* powers. Indeed, Justice Jackson cited *Curtiss-Wright* in his *Youngstown* concurrence and distinguished it as affecting "a situation in foreign territory."<sup>102</sup> Noting that seizing a steel mill within the United States was not such a case, he said of *Curtiss-Wright*: "That case does not solve the

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95. *Id.* at 10.

96. However, some members did complain about reports that the United States had paid only a portion of the money promised to Hamet as a bribe for his leading a paramilitary force against Tripoli to pressure his brother, the Bey of Tripoli, to end his predacious attacks against U.S. merchant ships in the Mediterranean. These members reasoned that he had served the United States well, and that other individuals might be less willing to cooperate in the future if he were not treated honorably. For a discussion of this operation, see SOFAER, *supra* note 9, at 218-21.

97. REISMAN AND BAKER, *supra* note 2, at 131.

98. See HAROLD HONGIU KOH, *THE NATIONAL SECURITY CONSTITUTION* 72 (1990) (popularizing this view, which was also recently embraced by Professor John Hart Ely). See generally ELY, *supra* note 9. This view is held by many others as well.

99. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

100. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

101. "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

102. 343 U.S. at 636 n.2.

present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs."<sup>103</sup> While no other member of the Court joined his concurrence, his own analysis clearly shows that Jackson was not endeavoring to "overturn" or otherwise modify *Curtiss-Wright* with respect to presidential power over external affairs.

Indeed, Justice Rehnquist also noted this distinction in *Goldwater v. Carter* (the Taiwan treaty case) in a concurring opinion joined by three other members of the Court:

The present case differs in several important respects from *Youngstown Sheet & Tube Co. v. Sawyer* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. . . . [A]s in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs."<sup>104</sup>

In my view, a careful reading of the two important decisions compels such a distinction. Even Columbia Law School Professor Louis Henkin, in recent years a powerful advocate of congressional power in foreign affairs, has acknowledged that *Youngstown* has not traditionally been viewed as a "foreign affairs" case.<sup>105</sup> A serious discussion of the separation of constitutional powers concerning covert action would be useful as the nation continues to emerge from the backlash to Vietnam, and I therefore regret that these two brilliant scholars did not include such an analysis in their book.

## VII. THE PRESIDENT'S INTELLIGENCE OVERSIGHT BOARD

In their introduction, Reisman and Baker note that "the special research problems encountered in studying this subject are formidable."<sup>106</sup> This is, if anything, an understatement. The inherent difficulties in researching politically or militarily sensitive data make their final product all the more admirable, but also prevented the authors from discussing some aspects of regulating covert action in detail. For example, they devote less than two paragraphs to the role of the President's Intelligence Oversight Board ("PIOB" or "IOB"<sup>107</sup>), suggesting that it "may also play a peripheral role in covert action mechanisms," but noting that "in at least one publicized instance, . . . the IOB's general counsel rendered an opinion on the legality of an ongoing covert operation."<sup>108</sup>

103. *Id.* at 637 n.2.

104. *Goldwater v. Carter*, 444 U.S. 996, 1004-05 (1979) (Rehnquist, J., concurring).

105. HENKIN, *supra* note 36, at 43.

106. REISMAN AND BAKER, *supra* note 2, at 2.

107. The abbreviation "IOB" was widely used during the Carter Administration, but — both to be consistent with usage for the President's Foreign Intelligence Advisory Board ("PFIAB," not "FIAB"), and, perhaps more importantly, to emphasize the authority of the Board as a component of the White House Office — the Reagan administration used the abbreviation "PIOB." President Clinton has returned to the "IOB" designation, dropping "President's" from the Board's title. *See infra* note 109.

108. REISMAN AND BAKER, *supra* note 2, at 122.

Having spent two years at the White House as Counsel to the PIOB in the early 1980s, I am able to offer a few observations on that organization.<sup>109</sup> Because virtually all of the PIOB's substantive work was highly classified, of course, I am no more able to address those areas in a public forum than were the authors of *Regulating Covert Action*. I can say that, at least during the years I was there, the PIOB was briefed regularly on ongoing "special activities," and I am unaware of any such operations subsequently coming to light that were not disclosed to us in a timely manner.<sup>110</sup>

A common criticism of the PIOB is that its small staff cannot possibly do an effective job. That was not my experience. While the immediate PIOB staff consisted, at the time, of a single attorney and an administrative staff member, the President charged scores of lawyers and investigators located throughout the Executive branch (including the general counsels and inspectors general of all of the intelligence agencies) with making regular reports to, and otherwise cooperating with, the PIOB. These individuals were highly professional and honorable men and women who took their responsibilities seriously and were fully forthcoming both in responding to inquiries and, perhaps more importantly, in initiating contacts when potential problems came to their attention.

While some of these individuals spent much of their time inquiring into legal issues surrounding intelligence activities — and thus knew the "rules" well — others addressed only those intelligence matters placed before them. For these latter individuals in particular, the obligation to submit regular reports to the PIOB affirming their agency's compliance with relevant laws, executive orders, and Attorney General-approved guidelines and procedures had a positive effect. If nothing else, it required them to focus their attention on the issue of compliance. Similarly, the requirement in the International Covenant on Civil and Political Rights that "States Parties . . . submit reports on the measures they have adopted which give effect to the rights recognized . . . and on the progress made in the enjoyment of those rights"<sup>111</sup> helps to promote respect for those legal obligations by requiring each State to focus on its own record of compliance. Even if no one had ever read the reports, the reporting requirement served a useful purpose simply by

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109. The authority for the PIOB during my service in the White House was Exec. Order No. 12,334 (December 4, 1981), which was revoked by President Clinton by Exec. Order No. 12,863 (September 13, 1993). Whereas the Reagan Executive Order established the PIOB as an independent three-member entity within the White House Office (with a requirement that the PIOB Chairman also serve on the PFIAB), President Clinton's order establishes an "Intelligence Oversight Board (IOB)" as "a standing committee of the PFIAB" consisting of as many as four members appointed by the PFIAB Chairman. Exec. Order No. 12,863, 3 C.F.R. 632 (1993), *reprinted in* 50 U.S.C.A. § 401 (West Supp. 1994).

110. For example, we were informed about "mining of the harbors" in support of the *Contra* program in Nicaragua prior to the unfortunate controversy in which senior members of the Senate Select Committee on Intelligence alleged that the activity had been concealed from them. Having seen the notes of a senior committee staff member at the time, I have reason to believe that the Senators were mistaken. At least one senior committee staff member who attended their covert action briefing wrote down a reference in his notes to mining harbors. This is not to suggest that the Senators were intentionally misrepresenting the facts; my assumption has always been that they simply did not focus on the issue when it was reported and consequently could not recall it when it came under attack in the press.

111. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 181, art. 40.

reminding relevant officials of the existing regulatory regime.<sup>112</sup>

To be sure, occasions arise when a field operative, or even an enthusiastic senior official, becomes so focused on mission accomplishment that legal rules and procedures are ignored or bypassed as mere unwarranted impediments. Given the stakes sometimes involved — which may include the freedom, or even the lives, of large numbers of people — such a reaction is to be expected and is one of the reasons the Executive branch intelligence oversight system exists. In my experience, the ignorance of legal rules was not a problem within the oversight community. The IGs and their staffs understood their role as “junk yard dogs” in pursuing possible violators and enforcing compliance, and in my view, the system worked quite well.

Further, senior intelligence officials often welcomed the existence of the PIOB, perhaps in part because it gave them a measure of “good faith” protection. If they wished to conduct an operation that was even arguably illegal or improper, they could report the activity to the Board and establish that they were not trying to “cover up” anything. And, to some extent, they also could “pass the buck” to a higher level if a controversy eventually arose over the activity. After all, if they could demonstrate that they had reported a questionable activity to the PIOB and that the PIOB neglected to bring the problem to the President’s attention, the “buck” would presumably stop with the PIOB.

One criticism leveled at the PIOB was that it lacked the subpoena power. To be sure, no such power existed — nor, it should be added, was such a power at all necessary. On the contrary, I learned very early that when you work directly for the President of the United States, you simply don’t *need* a subpoena power to get cooperation from within the Executive branch.<sup>113</sup>

Finally, a brief comment may be in order concerning the widely-criticized “legal opinion” which one of my successors as PIOB Counsel reportedly gave to Lt. Col. Oliver North, examining the applicability of the Boland

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112. Indeed, on one occasion that I recall, a newly appointed government official (whose intelligence responsibilities were peripheral to his primary duties) informed me that he first became aware of the detailed regulatory scheme when his staff brought him a draft PIOB report.

113. Ironically, this was an issue raised by Reisman and Baker, who write of the two White House intelligence boards: “Their influence appears to be limited. Although the heads of departments and agencies are required to provide the boards with all ‘necessary’ information, they need do so only ‘to the extent permitted by law.’” REISMAN AND BAKER *supra* note 2, at 123. The footnote to this statement cites section 102(d)(3) of the National Security Act of 1947, which provides that “the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.” *Id.* at 190-91, n.54. Early during my service as PIOB counsel, someone suggested that it might be necessary for an agency to withhold from the PIOB information about exceptionally sensitive activities. Disclosing any intelligence operation to the PIOB could not, however, even *arguably* be an “unauthorized disclosure” because disclosure is expressly *directed* by Exec. Order No. 12,334.

The instances over a two-year period in which I perceived a lack of full cooperation by senior Intelligence Community personnel could be enumerated on one hand (with fingers left over). On one occasion, an informal telephone call to a Pentagon service secretary within minutes produced a very apologetic general, hat in hand, who had apparently not understood his appropriate relationship with the civilians appointed by the Commander in Chief to oversee his activities. Another time, a disagreement with an agency head was promptly resolved by simply informing him that, if he found the PIOB’s legal interpretation of its authority to be unacceptable, the PIOB would go directly to the President for a clarification of the issue. In both instances, not only was the immediate problem resolved in favor of full and effective oversight, but future relations with the individuals and organizations involved were impeccable. From my perspective, the system worked well.

Amendment to the National Security Council. I have never seen the memo in question, and it would be inappropriate (not to mention difficult) for me to pass judgment on the substantive merits of the document. Perhaps the opinion was flawed, as many critics contend. But criticizing the PIOB Counsel for giving an "advisory opinion," in response to an inquiry about whether a specific matter otherwise within his jurisdiction would be contrary to the law, in my opinion, is not warranted.

A primary purpose of intelligence oversight is to promote full compliance with the laws and governing rules and regulations. Although it was not common, on more than one occasion while serving as PIOB Counsel, I was contacted by someone within the Intelligence Community who sought advice about whether a proposed new administrative rule or other matter would likely be acceptable to the PIOB. I did not hesitate to respond, and, in at least one such case, an agency subsequently issued a revised and more restrictive rule as a consequence of relatively mild concerns I had expressed during such a call. This experience reflected a general trend within the Intelligence Community of wanting to keep the PIOB happy. While, as a result of the "case or controversy" clause<sup>114</sup> of our Constitution, the Supreme Court may not issue "advisory opinions," it does not follow that the PIOB should repel inquiries for informal guidance. On the contrary, people within the Intelligence Community ought to be *encouraged* to seek guidance whenever they believe that their actions might run afoul of the rules.

### VIII. CONCLUSIONS

Reisman and Baker conclude their valuable study by reaffirming some of the obvious (and less than obvious<sup>115</sup>) "costs" associated with acting covertly. They nonetheless predict that such operations will continue and that decisionmakers will judge the legality of covert operations "not simply by reference to the property of secrecy, . . . but by reference to the many different policies engaged in the particular case, the options available, the aggregate consequences likely to attend each of the options, and so on."<sup>116</sup> They suggest:

Key parts of the focus of covert operations may change. It is apparent that external threats to national public order are increasingly being redefined in terms of a number of nongovernmental operations: terrorism, broadly and often inconsistently defined; organized crime and narcotics; and, to a lesser degree, transnational white-collar crime. The apprehension of those engaged in these activities must be international and . . . many police actions will incorporate a number of covert phases, which will increasingly take place abroad.<sup>117</sup>

While in the post-Cold War world "international legal tolerance for covert

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114. U.S. CONST. art. III, § 2.

115. One particularly insightful observation was that exposed secret operations may — *on the basis of their secrecy* — become more newsworthy than if the same action had taken place in the open. REISMAN AND BAKER, *supra* note 2, at 137.

116. *Id.* at 136-37.

117. *Id.* at 138.

operations may decline precipitously,"<sup>118</sup> and "fundamental changes in the domestic constitutive process" suggest that "more cooks [e.g., members of Congress] will be trying to make each covert stew,"<sup>119</sup> Reisman and Baker conclude with the "prognosis of a repetitive series of sequences: practice, crusade against the practice, resumption of the practice."<sup>120</sup> Since coercive covert operations are not likely to vanish from the policy maker's inventory of tools, the authors conclude with "a decalogue of executive guidelines for planning and implementing particular covert operations."<sup>121</sup> Among the most important of these are suggestions that nations attempt "to accomplish overtly what subordinates propose to do covertly"; never commit to refrain from all covert action; "eschew secrecy for its own sake"; only accomplish overtly lawful acts covertly; employ retrospective and judgmental congressional oversight; and "[i]n contemplating any covert operation, . . . assume that it will become public knowledge much sooner than you would like and decide if you can live with the consequences before you discover you have to."<sup>122</sup>

As a scholar who has spent much of the past decade trying to train lawyers to work effectively in the national security process, I was particularly delighted to see the authors' suggestion that the covert operations business "requires that lawyers who have the necessary background, but who are not in the direct chain of command[,] have an opportunity to submit their written views, which become part of the record."<sup>123</sup> The list includes other excellent advice, which the authors discuss more fully. This chapter alone is worth the price of the book for anyone seriously involved in the business of covert operations; but, as indicated earlier, *Regulating Covert Action* is a tremendously valuable resource for a far broader readership than the title might suggest. In addition, public curiosity about these activities remains such that no major public library collection will be complete without this volume. It is highly recommended.<sup>124</sup>

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118. *Id.*

119. *Id.* at 139.

120. *Id.*

121. *Id.* at 140.

122. *Id.* at 140-43.

123. *Id.* at 142.

124. One final comment may be in order. Like Professor Rummel's *Death by Government*, *supra* note 83, and scores of other valuable works (including, it might be observed, scholarship published in this *Journal*; see, e.g., Ruti Teitel, *Paradoxes in the Revolution of the Rule of Law*, 19 YALE J. INT'L L. 239 (1994)), research for this book was funded in part by the U.S. Institute of Peace — an organization recently identified as a possible target for defunding. See Robert S. Greenberger, *Obscure Peace Institute Is a Perfect Example Of Targets for GOP's Budget-Cutting Efforts*, WALL ST. J., Mar. 17, 1995, at A12. As a former officer of the Institute, I am hardly a neutral observer. But I strongly believe that public money spent promoting scholarship of this caliber is money well spent.

